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# Rebalancing the Unbalanced Constitution: Juridification and National Security in the United Kingdom

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## Introduction

The twentieth century history of judicial review in national security cases in the United Kingdom (UK) provides an interesting counter-perspective to the orthodox, expansionary, accounts of review of administrative discretion in that jurisdiction during the same period. While in *Ridge v. Baldwin*,<sup>1</sup> *Padfield v. Minister for Agriculture*<sup>2</sup> and *Anisminic v. Foreign Compensation Commission*<sup>3</sup> the Appellate Committee of the House of Lords was able to reinvigorate the prerogative orders and lay the foundations of modern administrative law,<sup>4</sup> judicial review of decisions taken on national security grounds was, for much of the twentieth century, held in an uneasy stasis. Simultaneously haunted by precedents such as *Liversidge v. Anderson*<sup>5</sup> and hamstrung by a perceived lack of competence to challenge judgments of the elected branches supported by assertions of imminent threat, the courts found themselves powerless to effectively displace the suggestion that national security questions were tantamount to being non-justiciable.<sup>6</sup>

Progress towards bringing national security decisions within the supervisory jurisdiction of the courts demonstrated the common law at its incremental worst, lagging significantly behind judicial review in other spheres of executive discretion. Successes were often Pyrrhic; even in the notable *GCHQ* case – in which executive orders taken pursuant to the prerogative were found to be susceptible to review on procedural fairness grounds – Lord Diplock was able to follow his seminal restatement of the grounds of judicial review with the assertion that national security nevertheless remained

... a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problems, which it involves.<sup>7</sup>

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<sup>1</sup> *Ridge v. Baldwin* [1964] A.C. 40.

<sup>2</sup> *Padfield v. Minister for Agriculture, Fisheries and Food* [1968] A.C. 997.

<sup>3</sup> *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>4</sup> For an overview see: R. Stevens, *The English Judges: Their Role in the Changing Constitution* (2005, Oxford; Hart Publishing).

<sup>5</sup> *Liversidge v. Anderson* [1942] A.C. 206. See also: *R v. Halliday* [1917] A.C. 260.

<sup>6</sup> *R v. Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766, p. 778: “There is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance between the two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task”.

<sup>7</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 A.C. 374, at [412]. See also *The Zamora* [1916] 2 A.C. 77, [107]: “Those who are responsible for the national security must be the sole judge of what national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public”.

The ‘striking consistency’<sup>8</sup> of the courts’ position during this period leads to the almost irresistible conclusion that national security decisions – regardless of their consequences for the rights or interests of individuals – fell unquestionably within the four corners of discretionary jurisdiction available to the executive, and therefore beyond the supervisory jurisdiction of the law courts.

In the light of broader developments in the law of judicial review, the ‘mystical significance’<sup>9</sup> attached to the executive assertion of national security demonstrates a number of significant departures from the orthodox account of the development of the judicial function within the constitution. First, judicial review cases in which national security issues were present embraced a peculiar counter-polycentricity mindset. While judicial avoidance of intensive review of social or economic issues frequently emphasised the inability of the court to second-guess complex policy choices, national security questions were presented differently, leaving a sense that it was the simplicity (the apparent self-evidence that national security decisions are for the executive alone), rather than the complexity of the discretionary judgements made, that prompted the judicial denial of competence to intervene. Facts which melded intricate questions of public power, sensitive evidence and individual liberties were routinely distilled into a zero-sum claim. Second, in a constitution which has enjoyed an ambivalent relationship with separation of powers – in which the division of governmental functions is as often inferred as it is made explicit<sup>10</sup> – the solidity with which the courts insulated (apparently unfettered) executive competence over questions of security was remarkable. Finally, and most pertinently, for the reason that national security litigation resisted (or, at the very least, did not fully embrace) the expansionary tendencies of mainstream judicial review during the latter part of the twentieth century, one of the standard threads running through the juridification narrative – the judicially-driven nature of constitutional development – is conspicuously absent from the national security arena. The cumulative effect of these factors is that review of national security issues was seen to either be on the fringes of justiciability or on the very lowest rungs of the *Wednesbury* scale. Either way, the twentieth century history of counter-terrorist judicial review in the UK demonstrated a constitution in which courts were both powerless to counter the effects of rights-infringing decisions and unduly reliant on the fortuitous compliance of the elected branches to achieve any meaningful change.<sup>11</sup>

### **Juridification on the Human Rights Act Model**

Prior to the introduction of the Human Rights Act (HRA), the inability of judicial review to operate as an effective tool of scrutiny in the national security arena amounted to a significant weakness in the ability of the courts to subject government

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<sup>8</sup> A. Tomkins, “National Security and the Role of the Court: a Changed Landscape?” (2010) 126 *Law Quarterly Review* 543, p. 543.

<sup>9</sup> S. Brown, “Public Interest Immunity” (1994) *Public Law* 579, p. 589.

<sup>10</sup> M. Arden, “Judicial Independence and Parliaments” in K. Ziegler, D. Baranger and A. W. Bradley (eds.), *Constitutionalism and the Role of Parliaments* (2007, Oxford; Hart Publishing), p.192.

<sup>11</sup> As both de Londras’ and Jenkins’ chapters in this collection remind us, the possibility of that both trends might continue has by no means been eradicated by the move toward heightened scrutiny in the counter-terrorism arena under the Human Rights Act 1998: F. de Londras, “Counter-Terrorist Judicial Review as Regulatory Constitutionalism” and D. Jenkins, “When Good Cases Go Bad: Unintended Consequences of Rights-Friendly Judgments”, in F. Davis & F. de Londras, *Critical Debates on Counter-Terrorism* (2014; Cambridge University Press).

to the rule of law. This problem was compounded by the parallel inadequacy of the legislature to effectively supervise the prerogative powers – the ‘dead ground’ of the constitution<sup>12</sup> – frequently deployed in pursuance of national security objectives. It took implementation of the Human Rights Act 1998 to provide the legislative impetus to weaken, and finally break down, this rigid separation of functions and to expose national security decisions which interfered with individual rights to meaningful judicial scrutiny. The extent of this change should not be understated; in the light of the implementation of the Human Rights Act, national security justifications could (or should) no longer operate as virtually unquestionable defences to executive, or legislative, action interfering with one or more of the Convention rights.<sup>13</sup>

The reach of the Human Rights Act’s provisions is potentially huge; section 3(1) directs that *all* statutory provisions be interpreted – as far as is possible to do so – in order to achieve compatibility with the Convention rights; section 6(1) requires that *all* executive decisions (other than those compelled by primary legislation or by legislation which might not be interpreted in a Convention right-compatible manner<sup>14</sup>) be compliant with the Convention rights. Operating in tandem, these two provisions narrowed those areas of governmental action, which could – previously in some cases without even meaningful argument – be found to fall outside the reach of judicial scrutiny. As Baroness Hale has recognised, following the implementation of the Human Rights Act, ‘if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate it must.’<sup>15</sup> The Human Rights Act therefore required that a higher standard of justification be applied before either legislative or executive interference with fundamental rights on national security grounds would be deemed to be necessary in a democratic society. National security might provide justification for interference with rights, but would no longer operate as an unquestionable trump.

But just as national security would no longer act to render judicial supervision meaningless, nor would the Human Rights Act subject all decisions taken in the name of the maintenance of security to judicial override. While judicial protection of ECHR rights is very clearly at the heart of the Human Rights Act scheme, the powers granted to courts do not permit the explicit invalidation of primary legislation and appreciate that infringements of qualified rights might be permissible – so long as proportionate – in pursuance of the protection of national security objectives. In parallel, the elected branches were also to shoulder partial responsibility for the realisation of the Human Rights Act project. Far then from simply amounting to an ‘unprecedented transfer of political power from the executive and legislature to the judiciary’<sup>16</sup> the Human Rights Act sought to realign constitutional power in a more

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<sup>12</sup> *R v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, [567].

<sup>13</sup> Section 1(1) Human Rights Act 1998.

<sup>14</sup> Section 6(2) Human Rights Act 1998.

<sup>15</sup> *R (on the application of Gentle) v. The Prime Minister* [2008] UKHL 20, at [60]. See also *International Transport Roth GmbH v. Secretary of State for the Home Department* [2003] QB 728, at [27] (Simon Brown LJ): “Judges nowadays have no alternative but to apply the Human Rights Act 1998”.

<sup>16</sup> K. D. Ewing, “The Human Rights Act and Parliamentary Democracy” (1999) 62 *Modern Law Review* 79, p. 79. See also M. Pinto-Duschinsky, *Bringing Human Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom* (2010, London; Policy Exchange), p. 9. And for an especially indignant assessment see J. Allan, “Statutory Bills of Rights:

sophisticated manner.<sup>17</sup> Properly construed, the juridification prompted by the Human Rights Act should be seen as a complement, rather than a challenge, to democratic government.<sup>18</sup> Rather than to empower the judicial branch at the explicit expense of the political, the intent behind the Human Rights Act was to encourage protection of, and sensitivity to, rights through ‘institutional balance, joint responsibility and deliberative dialogue.’<sup>19</sup> In a departure from the classic, constitutionalised and judicially-enforced bill of rights model, the Human Rights Act envisaged collaboration between the branches of government in which Parliament was intended to be as active a participant in protecting rights as the independent judiciary.<sup>20</sup> The Act therefore serves dual constitutional aims: first (and classically) to function as a judicially-imposed stop on rights-infringing policies and to permit the higher courts to highlight rights-based inadequacies in primary legislation; second to function as a catalyst for the development of rights-conscious policy and legislation.

In the national security arena, in which the effects of judicial supervision were historically as inconspicuous as they were ineffectual,<sup>21</sup> this rebalancing of constitutional supervisory powers might be seen as being unobjectionable, valuable, perhaps even to be celebrated. Given that national security decisions and policy were traditionally seen to be the sole preserve of the executive – ‘[t]he first duty of government is the defence of the realm’<sup>22</sup> – the Human Rights Act made the realisation of effective checks and balances a more tangible possibility. Yet the undoubted difficulty of the Human Rights Act was that it also brought with it the danger of breaking down the principled distinction between primary and secondary decision-maker that had traditionally supported judicial review of executive discretion. As a result, critics of juridification argued that within the enforcement of the Human Rights Act lay the potential to illegitimately stifle democratic governance through challenging the legal sovereignty of Parliament,<sup>23</sup> through the tendency of the

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You read words in, you read words out, you take Parliament’s clear intention and you shake it all about – doin’ the Sankey Hanky Panky” in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011; Oxford University Press).

<sup>17</sup> On which see R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2011; Cambridge University Press).

<sup>18</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [42]: “It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally regarded as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself”. And see: F. Davis, “The Human Rights Act and Juridification: Saving Democracy from Law” (2010) 30 *Politics* 91.

<sup>19</sup> S. Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 *American Journal of Comparative Law* 707, p. 710.

<sup>20</sup> *Rights Brought Home: The Human Rights Bill* (1997), Cm.3782, para. 3.6 available at <http://www.archive.official-documents.co.uk/document/hoffice/rights/contents.htm>

<sup>21</sup> On which see: I. Leigh and L. Lustgarten (eds.), *In From the Cold: National Security and Parliamentary Democracy* (1994, Oxford; Clarendon Press), Chapter 12.

<sup>22</sup> *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728, at [85]. See also: *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [75].

<sup>23</sup> M. Pinto-Duschinsky, *Bringing Human Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom* (2010, London; Policy Exchange), p.57: “[t]he post-1998 system is unacceptable because it permits the judiciary to usurp parliamentary sovereignty in a manner that lacks democratic accountability”.

elected branches to ‘capitulate’ to the demands of adjudicative processes<sup>24</sup> and through prompting the development of only policy and legislation felt to be able to withstand judicial scrutiny.<sup>25</sup>

Restraint of governmental power was, of course, a partial objective of the Human Rights Act, but the emergence of a so-called ‘culture of compliance’ under which the elected branches of government (in spite of the apparent institutional balance struck by the Human Rights Act) found themselves *subjected* – explicitly and implicitly – to judicial determinations of rights questions was also touted as a consequence of this rebalancing of constitutional power.<sup>26</sup> Though the likelihood of the (supposedly) sovereign UK Parliament suddenly reconceptualising itself as an ‘adjunct of the courts’<sup>27</sup> in the aftermath of implementation of the Act seemed at best remote, this did not prevent advocates seeking to deny the ability of the courts to adjudicate over the compliance of decisions taken in the name of national security. As much is evident from the attempts of the Attorney General – in the seminal *Belmarsh* decision – to suggest that even in the light of the Human Rights Act “[i]t is for the Executive and Legislature, as a matter of political judgment, to decide what measures [are] necessary to protect public security”.<sup>28</sup> In response to the Attorney General’s attempt to oust the supervisory jurisdiction granted by the Human Rights Act, the then Senior Law Lord, Lord Bingham, issued the following corrective

The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate.<sup>29</sup>

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<sup>24</sup> J. Allan, “Statutory Bills of Rights: You read words in, you read words out, you take Parliament’s clear intention and you shake it all about – doin’ the Sankey Hanky Panky” in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011; Oxford University Press), p. 116 - 120.

<sup>25</sup> On which see: J. L. Hiebert, “Governing Like Judges?” in T. Campbell, K. D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011; Oxford University Press).

<sup>26</sup> D. Nicol, “The Human Rights Act and the Politicians” (2004) 24 *Legal Studies* 451, p. 453

<sup>27</sup> D. Nicol, “The Human Rights Act and the Politicians” (2004) 24 *Legal Studies* 451, p. 453

<sup>28</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [85].

<sup>29</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [42].

The sentiments behind Lord Bingham's admonishment of the Attorney General were echoed elsewhere in the House of Lords' decision.<sup>30</sup> The consequence of the legislative direction provided by the Human Rights Act – as Lord Bingham noted in *Belmarsh* – was that judicial scrutiny of executive decisions and/or legislation taken in furtherance of national security objectives on the basis of the Convention rights enjoyed parliamentary (and therefore indirectly democratic) sanction. The fact that the Human Rights Act – a primary legislative instrument – *required* courts to exercise this counter-majoritarian function therefore provides a partial rejoinder to accounts of the judicialised constitution which emphasise the empire-building tendencies of the courts under which the judges themselves have lobbied for, and developed the common law in order to obtain, a greater constitutional role.<sup>31</sup> By contrast with the pre-Human Rights Act emergence of a nascent common law rights jurisprudence,<sup>32</sup> the courts' constitutional functions under the Act come with a legislative seal of approval.

The fact that the Human Rights Act was underpinned by a manifesto commitment made by the incoming 1997 Labour Administration, and subsequently enacted in primary legislation, cannot – however – fully address claims made by critics of the expanded reach of judicial power that the enforcement of standards against government “constrains the space for any future democratic decisions on that issue”.<sup>33</sup> We can say that the juridification of questions of rights was a clear – albeit partial – policy objective of the enactment and implementation of the Human Rights Act; but can also state that “political rights review”<sup>34</sup> is as integral to the design and operation of the Act as review undertaken by courts. Nor can the Human Rights Act's democratic heritage explain away the difficulties of its practical implementation, for – as Mark Tushnet has observed<sup>35</sup> – the legislative mandate underpinning the courts' role in policing ECHR compliance at the national level disguises potential difficulties in its enforcement; judicial review under the New Commonwealth Model of Constitutionalism<sup>36</sup> holds the potential to collapse into that which it seeks to eschew – namely, the polar opposites of strong form judicial review and the unchallengeable primacy of the political branches (as manifested in the formal doctrine of parliamentary sovereignty).

## The Continued Deification of National Security

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<sup>30</sup> For instance: *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [176].

<sup>31</sup> M. Bevir, “The Westminster Model, Governance and Judicial Reform” (2008) 61 *Parliamentary Affairs* 559, p. 569.

<sup>32</sup> See *R v. Lord Chancellor, ex parte Witham* [1998] Q.B. 575.

<sup>33</sup> M. Bevir, “The Westminster Model, Governance and Judicial Reform” (2008) 61 *Parliamentary Affairs* 559, p. 565.

<sup>34</sup> J. L. Hiebert, “Parliament and the Human Rights Act: Can the JCHR help facilitate a Culture of Rights?” (2006) 4 *International Journal of Constitutional Law* 1, p. 3: “A key assumption envisaged by [the parliamentary rights] model is that rights will be protected not simply through after-the-fact evaluations by courts but by establishing opportunities and obligations for political rights review by ministers, parliamentarians and public authorities that are distinct from, and prior to, judicial review”.

<sup>35</sup> M. Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries” (2003) 38 *Wake Forest Law Review* 813.

<sup>36</sup> S. Gardbaum, *The New Commonwealth Model of Constitutionalism* (2013; Cambridge University Press).

In spite of the legislative prompt provided by the Human Rights Act, obstacles to the justiciability of national security issues were, however, by no means immediately eradicated following the reception of ECHR rights into domestic law. The statutory juridification of rights issues in the national security arena was – initially at least – beholden to the clear precedents regarding the perceived institutional incompetence of courts to question executive judgments taken in the interests of security.

In *Secretary of State for the Home Department v. Rehman* – concerning the deportation of a Pakistani national on grounds of the potential threat to national security that he posed – the House of Lords unanimously deferred to the executive assessment of the risk presented.<sup>37</sup> As Lord Hoffmann noted

In matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy, which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons to whom the people have elected and whom they can remove.<sup>38</sup>

Legitimacy in the field of national security decision making, Hoffmann contends, can only result from an electoral mandate. It follows that such decisions are – regardless of content or implications – due the respect of the judiciary.

Lord Hoffmann is not the only judge to perpetuate this rigid separation of function in the Human Rights Act era. Laws LJ too, in *International Transport Roth GmbH v. Secretary of State for the Home Department*, spoke of the paradigmatic areas of executive responsibility (security being one) within which the courts cannot ‘sensibly’ scrutinise the merits of decisions taken.<sup>39</sup> Both approaches reflect a highly territorial approach to the separation of power under which certain governmental functions are held to be so umbilically linked to the role of a particular arm of government as to exclude any legitimate review or scrutiny undertaken by another branch. The resulting ‘dilution’<sup>40</sup> of judicial scrutiny powers in relation to such functions holds the capacity to see judicial review rendered otiose on the basis of a perceived lack of legitimacy.<sup>41</sup>

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<sup>37</sup> *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47; [2003] 1 A.C. 153.

<sup>38</sup> *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47; [2003] 1 A.C. 153, at [50]-[54] and [62] (Lord Hoffmann).

<sup>39</sup> *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728, at [77] and [85]: “The first duty of government is the defence of the realm”.

<sup>40</sup> On which see C. Chan, “Running Business as Usual: Deference in Counter-Terrorism Rights Review” in F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorist Judicial Review* (2014; Cambridge University Press), p. XXX.

<sup>41</sup> For the most powerful critique of deference see: T.R.S. Allan, “Human Rights and Judicial Review: a Critique of “Due Deference”” (2006) *Cambridge Law Journal* 671.



The continuance of this – to adopt Murray Hunt’s terminology – spatial understanding of the interrelationship between the relevant powers of courts, executive and legislature in the national security arena is questionable.<sup>42</sup> First, it runs counter to the trend – begun in the mid-twentieth century – towards breaking down jurisdictional barriers to judicial review,<sup>43</sup> marking national security decisions out as being resistant to broader (judicially engineered) moves towards expanding the scope and rigour of judicial review. Second, through the denial of the relevance of the rights implications to the judicial assessment of the legality of national security decisions it frustrates the purpose of the Human Rights Act, namely to subject governmental decisions which impact on individual liberties to judicial scrutiny and supervision *regardless* of the area of policy in which the decision is taken.

### **The Necessary Superiority of the Political**

Though the Human Rights Act sought to find a middle ground between the competing primacies of law and politics, the superior democratic claims of the political branches would not be easily displaced. As has already been alluded to, the continued influence of parliamentary sovereignty – and behind its façade the executive dominance of the legislature – perpetuates the sense that legislative decisions are (or should be) immune from challenge. While the standard common law decisions on the legal authority of Parliament – *Ellen St Estates*<sup>44</sup> and *British Railways Board v. Pickin*<sup>45</sup> among them – have lost some of their allure in the light of constitutional developments,<sup>46</sup> the sense among many that Parliament should remain necessarily supreme, and its decisions unquestionable in the courts, remains undiminished.

Michael Howard, then Leader of the Conservative Party, for instance responded to the *Belmarsh* decision in the following terms

Parliament must be supreme. Aggressive judicial activism will not only undermine the public’s confidence in the impartiality of the judiciary, but it could also put our security at risk – and with it the freedoms the judges seek to defend.<sup>47</sup>

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<sup>42</sup> M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law needs the concept of “Due Deference”” in N. Bamforth and P. Leyland (eds.), *Public Law in an Multi-Layered Constitution* (2003, Oxford; Hart Publishing).

<sup>43</sup> M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law needs the concept of “Due Deference”” in N. Bamforth and P. Leyland (eds.), *Public Law in an Multi-Layered Constitution* (2003, Oxford; Hart Publishing), p.347: “Much of the progress of modern public law has been in rolling back what were formerly considered to be zones of immunity from judicial review, reformulating the considerations which were thought to justify total immunity and reintegrating them into substantive public law as considerations which affect the particular, contextualised application of what have increasingly become accepted as universally applicable general principles. That progress has been hard fought for, but it is constantly threatened by the failure to ground deference theory in anything other than crudely formalistic notions of the separation of powers and the supposed continued sovereignty of Parliament.”

<sup>44</sup> *Ellen Street Estates v. Minister of Health* [1934] 1 K.B. 590.

<sup>45</sup> *British Railways Board v. Pickin* [1974] A.C. 765.

<sup>46</sup> Not least the United Kingdom’s membership of the European Union. On which see N. Barber, “The Afterlife of Parliamentary Sovereignty” (2011) 9 *International Journal of Constitutional Law* 144.

<sup>47</sup> M. Howard, “Judges Must Bow to the Will of Parliament” *The Telegraph* (10 August 2005).

Similar claims resonate beyond the national security arena, underpinning criticisms of perceived overreach by the European Court of Human Rights (ECtHR)<sup>48</sup> and of the excessive powers allocated to the courts under the Human Rights Act. Unease over this apparent new constitutional imbalance has prompted calls to reform or repeal the Human Rights Act in order to reassert the primacy of the elected branches: David Cameron – in taking the 2011 decision to convene a Commission to examine the case for the adoption of a British Bill of Rights – argued that “it is about time we ensured that [human rights] decisions are made in this Parliament rather than in the courts”.<sup>49</sup>

The picture painted is one of stark choices; between courts and Parliament, between legitimate or illegitimate decisions, between individual freedom and security. In the national security arena, this discourse is – as we have seen – underpinned by a weighty body of jurisprudence maintaining a division between questions of policy and law. At the level of constitutional principle this approach derives further support from the political constitution’s ideological preference for elected officials over courts<sup>50</sup> and ultimately – of course – also appeals to the Diceyan subjection of courts to the will of Parliament.<sup>51</sup> This binary division of powers is – to a degree – reflected in the institutional design of the Human Rights Act; parliamentary sovereignty was clearly intended to be preserved in form.<sup>52</sup> But to deny the valid judicial input into questions engaging both rights and national security on that basis is to discount the rather more sophisticated separation of powers envisaged by the framers of the Act.<sup>53</sup>

Responses of this sort to judicial decisions which are perceived to frustrate the objectives of democratically elected officials are, of course, by no means new.<sup>54</sup> But given the late-twentieth century rebalancing of constitutional power, culminating in the implementation of the Human Rights Act, such continued denials of judicial competence to examine legislative and executive decisions on rights grounds almost certainly tell us something about the failure of the Act to embed a culture of justification across constitutional processes and of the inability of dialogue theory to accurately capture the relative passion and dispassion of parliamentarians and judges.<sup>55</sup> The sense that Parliament be required to justify its enactments – that they be tested against (even self-imposed) standards of legality – therefore continues to sit uneasily with the constitution’s traditional reverence for statutory language and the unquestionable legal authority of the legislature.<sup>56</sup> In the face of this tension, claims regarding the solidity of the Human Rights Act’s position within the United

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<sup>48</sup> M. Pinto-Duschinsky, *Bringing Human Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom* (2010, London; Policy Exchange,), p.5.

<sup>49</sup> HC Debs, Vol.523, Col.955, 16 February 2011. And see: The Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (18 December 2012) available at <http://www.justice.gov.uk/about/cbr>.

<sup>50</sup> J.A.G. Griffith, “The Political Constitution” (1979) 42 *Modern Law Review* 1.

<sup>51</sup> Cf. R. Masterman and J. Murkens, “Skirting Supremacy and Subservience: The Constitutional Authority of the United Kingdom Supreme Court” (2013) *Public Law* (forthcoming)

<sup>52</sup> HC Debs, Vol.306, Col.772, 16 February 1998.

<sup>53</sup> On which see: R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2011; Cambridge University Press).

<sup>54</sup> A. Le Sueur, “The Judicial Review Debate: From Partnership to Friction” (1996) 31 *Government and Opposition* 8; I. Loveland, “The War against the Judges” (1997) 68 *Political Quarterly* 162.

<sup>55</sup> On which see G. Phillipson, “The Human Rights Act, Dialogue and Constitutional Principles” in R. Masterman and I. Leigh (eds.), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (2013; Oxford University Press).

<sup>56</sup> G. Marshall, *Constitutional Theory* (1971, Oxford; Clarendon), p.74.

Kingdom's new constitutional settlement should be treated with a degree of caution, but so too do those arguments which would position the elected branches as now finding themselves at the mercy of the judges.

While it has long been acknowledged that courts play a political role – “[t]o require a supreme court to make certain kinds of political decisions does not make those decisions any less political”<sup>57</sup> – the extent to which judicial intervention is permitted, and the consequences of intervention for the decision under scrutiny, remain issues of intense controversy. But accurate assessment of these issues is, it is argued, hampered by base-level denials of the role to be played by courts in the assessment of certain areas claimed to be within the exclusive competence of the executive or legislature. To defend an activity as being based on a “pre-eminently political judgment”<sup>58</sup> should not insulate that activity from questioning scrutiny (within Parliament or the courts) any more that it should automate compliance with law.

### Deference and Relative Institutional Competence

Deference has in many respects become the “the classic separation of powers device articulated in the post-Human Rights Act era”.<sup>59</sup> It is the method by which the potential for Human Rights Act review to morph into something altogether more potent, more capable (perhaps) of truly stifling democratic government, has been – for the most part – avoided.<sup>60</sup> That perceived institutional superiority should impact on judicial responses to legislative initiatives argued to infringe rights should – in a system shaped by parliamentary sovereignty – come as no great surprise. Deference ‘as submission’ – that is, the self-denial of the competence to scrutinise decisions in specific areas of policy – is however incompatible with the new constitutional equilibrium which the Human Rights Act sought to cement.<sup>61</sup> To this extent, Lord Hoffmann – in the *ProLife Alliance* decision – was correct to highlight the inaccuracy of the apparent subjection of courts to the elected branches perpetuated by the *language* of deference.<sup>62</sup>

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<sup>57</sup> J.A.G. Griffith, “The Political Constitution” (1979) 42 *Modern Law Review* 1, p. 16.

<sup>58</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [29].

<sup>59</sup> S. Tierney, “Determining the State of Exception: What Role for Parliament and the Courts?” (2005) 68 *Modern Law Review* 668, p. 670.

<sup>60</sup> It should be noted however, that the House of Lords has denied the existence of a specific methodology of deference, preferring to refer to the “ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice” (see *Huang v. Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167, at [16]).

<sup>61</sup> See: D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in M. Taggart (ed.), *The Province of Administrative Law* (1997, Oxford; Hart Publishing) and – for specific discussion in the HRA context – A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009; Cambridge University Press), Chapters 7, 8 and 9. A dedicated account of deference in the counter-terrorist judicial review context is provided in Chan’s chapter in this volume, with the model of deference favoured here broadly consonant with her modified ‘business as usual’ approach (see C. Chan, “Running Business as Usual: Deference in Counter-Terrorism Rights Review” in F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorist Judicial Review* (2014; Cambridge University Press), p. XXX).

<sup>62</sup> *R (on the application of ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 A.C. 185, at [75].

While a degree of deference is – as Lord Bingham has recognised<sup>63</sup> – a natural response to the uncertain territory the judges are confronted with in assessing the ECHR implications of national security decisions, this has not (indeed should not) come at the expense of meaningful scrutiny of the rights issues raised. In *Belmarsh*, as much was recognised by Lord Rodger of Earlsferry who noted that “[d]eference does not mean abasement ... even in matters of national security”.<sup>64</sup> Nor – despite the “great weight”<sup>65</sup> which continues to attach to primary legislation – is deference the automated judicial response to legislative action; as Lord Bingham noted in *Lichniak*, “[t]he fact that a statute represents the settled will of the democratic assembly is not a conclusive reason for upholding it”.<sup>66</sup> What deference does permit, however, is the preservation of the sense that certain decisions are more appropriately determined by (elected) political actors

The more purely political ... a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.<sup>67</sup>

This concession – while perhaps a truism – importantly does not exclude the possibility, or legitimacy, of judicial review.<sup>68</sup>

However, while the abandonment of submissive deference marked by *Belmarsh* stands as a clear step towards closing the accountability loop in national security decisions this is not to suggest that the deployment of ECHR based review has been without controversy. Deference might serve to preserve respect for the policy choices of the primary decision-maker, but the balance of power apparent on the face of the Act may nonetheless present difficulties once deployed in practice.

First, the readiness of courts to ‘read in’ implied conditions and terms into ostensibly clear legislative provisions has, in particular, drawn criticism from the parliamentary Joint Committee on Human Rights (JCHR). In its 2008 report into *Counter Terrorism Policy and Human Rights*, the Joint Committee noted with some surprise the willingness of the Law Lords to read words into statutory provisions in order to render them compatible with the ECHR rights.<sup>69</sup> Specifically, the JCHR considered that the use of section 3(1) in *Secretary of State for the Home Department v. MB* was

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<sup>63</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [29]. See also A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009; Cambridge University Press), p. 212 - 214.

<sup>64</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [176]. See also: *R (on the application of Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, at [46].

<sup>65</sup> *R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312, at [33].

<sup>66</sup> *R v. Lichniak* [2002] UKHL 47; [2003] 1 A.C. 903, at [14].

<sup>67</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [29].

<sup>68</sup> On which also see F. De Londras “Counter-Terrorist Judicial Review as Regulatory Constitutionalism” in F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorist Judicial Review* (2014; Cambridge University Press), p. XXX.

<sup>69</sup> Joint Committee on Human Rights, *Counter Terrorism Policy and Human Rights* (HL 50/HC 199), 7 February 2008, para.46.

particularly difficult to defend.<sup>70</sup> *MB* concerned the compatibility of the system of closed material hearings handled by special advocates in control order cases under sections 2 and 3(1)(a) of the Prevention of Terrorism Act 2005 with Article 6(1) of the ECHR. By a four-to-one majority,<sup>71</sup> the House of Lords held that the case should be referred back to the trial judge, relying on section 3(1) to subject the provisions to the requirements of procedural fairness inherent in Article 6(1).<sup>72</sup>

Given its own interpretation of the overall scheme of the Human Rights Act, the JCHR felt that the application of section 3(1) in *MB* was particularly hard to justify; the Committee argued

... the Human Rights Act deliberately gives Parliament a central role in deciding how best to protect the rights protected in the EHCR. Striking the balance between sections 3 and 4 of the Human Rights Act is crucial to the scheme of democratic rights protection. In our view it would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests.<sup>73</sup>

Judicially assessed compatibility did not, in this instance, equate with clarity. That the precise means by which Article 6 was to be vindicated following this use of section 3 remained uncertain ultimately resulted in the issue returning to the apex court in *AF (No.3)*.<sup>74</sup>

By the time *AF* reached the House of Lords, the Grand Chamber of the ECtHR had handed down its decision in *A v. United Kingdom*.<sup>75</sup> The consequences of *A* for the domestic litigation were in its conclusive finding that “national security may need to give way to the interests of a fair hearing”.<sup>76</sup> As Lord Scott summarised, the question for the Law Lords was whether “a judicial process the purpose of which is to impose, or to confirm the imposition of, onerous obligations on individuals on grounds and evidence of which they are not and cannot be informed constitute a fair hearing? The judgment of the Grand Chamber in *A v. United Kingdom* [...] has made clear that, for the purpose of Strasbourg jurisprudence and article 6(1) of the Convention, it does not”.<sup>77</sup> The finding in *A* was that the “requirements of a fair hearing are *never* satisfied if the decision is “based solely or to a decisive extent” on closed material”.<sup>78</sup> Acknowledging that the ruling might “destroy the system of control orders” a hesitance to directly apply *A* is discernible from a number of the Law Lords’ speeches.<sup>79</sup> Yet, in the face of a recent, authoritative and on-point decision from the

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<sup>70</sup> *Secretary of State for the Home Department v. MB* [2007] UKHL 46; [2008] 1 AC 440.

<sup>71</sup> *Secretary of State for the Home Department v. MB* [2007] UKHL 46; [2008] 1 AC 440, Lord Hoffmann dissenting (at [45]-[55]).

<sup>72</sup> *Secretary of State for the Home Department v. MB* [2007] UKHL 46; [2008] 1 AC 440, at [72].

<sup>73</sup> Joint Committee on Human Rights, *Counter Terrorism Policy and Human Rights* (HL 50/HC 199), 7 February 2008, para.47.

<sup>74</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269.

<sup>75</sup> *A v. United Kingdom* (2009) 49 EHRR 625.

<sup>76</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [121].

<sup>77</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [96].

<sup>78</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [71].

<sup>79</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [70] and [98].

Grand Chamber of the ECtHR, the Law Lords felt compelled to apply the Strasbourg ruling. Second then, the nature of the appropriate response of national courts in human rights litigation may well be conditioned by factors external to the Human Rights Act itself, and to the courts' perceptions of their own institutional competence vis-à-vis the elected branches of government. Even though the Law Lords were conscious that the consequence of their decision might be abandonment of the control order regime, the outcome was felt to be unavoidable in the light of the state's obligations under the ECHR: "[e]ven though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed".<sup>80</sup>

### Engagement, Refinement, Dialogue?

It is of course correct to say that Parliament, the executive and courts undertake different constitutional functions,<sup>81</sup> and that *primary* responsibility for certain of those functions might rest with one branch of government. But to then say that – as a result – those functions should continue to be immune to scrutiny by one or more of the other branches is to suggest something quite different. The Human Rights Act has gone some way to establishing a new constitutional equilibrium.<sup>82</sup> Human Rights Act review does not subject the elected branches of government to the rule of the courts, but cultivates a tension between the two that is abundantly clear in the realm of state security

The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual.<sup>83</sup>

Even in the light of the developments prompted by the Human Rights Act, the role of the courts remains constitutionally secondary in at least one crucial respect; as Laws LJ has written

The judges are constrained ... rightly, by the fact that their role is reactive; they cannot initiate; all they can do is apply principle to what is brought before them by others. Nothing could be more distinct from the duty of political creativity owed to us by Members of Parliament.<sup>84</sup>

To suggest that the Human Rights Act therefore "welcomes the courts into the policy-making process"<sup>85</sup> is to mislead as to the necessarily responsive role played by the domestic judiciary when asked to examine ECHR compliance of a particular policy or legislative initiative.

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<sup>80</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [98].

<sup>81</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [42].

<sup>82</sup> See also: J. Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *Public Law* 562, p. 578.

<sup>83</sup> *Secretary of State for the Home Department v. AF (No.3)* [2010] 2 A.C. 269, at [75].

<sup>84</sup> J. Laws, "Law and Democracy" (1995) *Public Law* 72, p. 93.

<sup>85</sup> M. Bevir, "The Westminster Model, Governance and Judicial Reform" (2008) 61 *Parliamentary Affairs* 559, p. 571.

Having said this – looking at the recent transition from indefinite detention without trial,<sup>86</sup> to control orders,<sup>87</sup> to terrorism prevention and investigation measures<sup>88</sup> – it is clear that judicial decisions *have* influenced the revision and refinement of legislation in the national security field (and powers exercised under that legislation) to an extent that, pre-Human Rights Act, would have been inconceivable. Is this influence constitutionally intolerable? Those who would appeal to the Diceyan understanding of legislation immune from legal challenge, to notions of pure and (potentially) unquestionable democratic/political judgment and expertise,<sup>89</sup> or (increasingly) to a notion of national sovereignty,<sup>90</sup> would argue that it is. A rather basic counter-argument would defend this judicial refining role on pragmatic grounds, given that the initiatives responded to amount to a catalogue of “repressive measures unprecedented in peacetime Britain”,<sup>91</sup> that legislation in this field is occasionally hastily enacted,<sup>92</sup> and that – without the (limited) powers bestowed by the Human Rights Act – these powers would be all the more likely to exist in a constitutional “vacuum in which the citizen would be kept without protection against a misuse of executive powers”.<sup>93</sup>

A more sophisticated thesis would suggest that the constitution has developed to the extent that claims to unquestionable or unchallengeable authority (whatever their source) – and the accountability vacuums which result – are rightly regarded with scepticism.<sup>94</sup> The hierarchical constitution with Parliament at its pinnacle has given way to something more heterarchical, which seeks to give recognition to institutional competence and expertise without allowing either to operate as insulation from scrutiny. This is recognised structurally in the weak form of legislative review established by the Human Rights Act and practically in the judicial processes of weighing competing considerations. Affording a degree of latitude – deference – to the range of responses available to the primary decision maker, recognising the differing nature of the decision-making process and the reasons (and evidence) articulated in support of a given policy decision, allow courts to acknowledge the distinct constitutional roles of the legislature and executive without either usurping them or prompting the abandonment of objective assessment of the rights implications of the impugned decision.<sup>95</sup>

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<sup>86</sup> Anti-Terrorism, Crime and Security Act 2001.

<sup>87</sup> Prevention of Terrorism Act 2005.

<sup>88</sup> Terrorism Prevention and Investigation Measures Act 2012.

<sup>89</sup> J. Allan, “Statutory Bills of Rights: You read words in, you read words out, you take Parliament’s clear intention and you shake it all about – doin’ the Sankey Hanky Panky” in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011; Oxford University Press), p. 121 - 122.

<sup>90</sup> M. Pinto-Duschinsky, *Bringing Human Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom* (2010, London; Policy Exchange,).

<sup>91</sup> K.D. Ewing, *The Bonfire of the Liberties* (2010; Oxford University Press), p. 10.

<sup>92</sup> For a survey see A. Tomkins, “Parliament, Human Rights and Counter-Terrorism” in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011; Oxford University Press).

<sup>93</sup> *R v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, at [567].

<sup>94</sup> *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728, at [71]-[75].

<sup>95</sup> See generally: R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2011; Cambridge University Press), Chapter 5.

## **The Rebalanced – Juridified – Constitution?**

The counter-majoritarian role that the Human Rights Act envisages courts play – rather than damaging democratic governance – should be seen as supporting, or complementing, it by both subjecting the (hypothetically unlimited) legislative authority of Parliament to rights-based audit and by enabling courts to render unlawful public body decisions which disproportionately interfere with those same rights. In policing the Convention rights the courts are able to bring to bear concerns relating to liberties which the democratic or policy-making process may be ill-positioned to consider (the impact of decisions on individual liberty). That national security issues are no longer regarded as being tantamount to non-justiciable is – far from amounting to a challenge to the democratic process – a clear advance for a constitution purporting to adhere to the values of the rule of law. The Human Rights Act does not make policy-makers out of judges any more than it subjects the policy-making process to the whims of the courts. Rather it permits issues cutting across the intersection of policy, expert judgment, and sensitive factual data to be analysed for compatibility with human rights norms, tempered by the acknowledgment on the part of the courts that deference preserves the primary decision-making autonomy of the elected branches. A higher standard of justification may now be required of rights-infringing decisions taken in the name of national security, but we should be careful to portray this as strengthening rather than compromising our constitutional systems of accountability.